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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/990,013	11/21/2001	James E. Johanson	8945-25 (149194)	2419

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EXAMINER
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LE, TAN

ART UNIT	PAPER NUMBER
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3632

DATE MAILED: 08/04/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 09/990,013	<b>Applicant(s)</b> JOHANSON ET AL.	
	<b>Examiner</b> Tan Le	<b>Art Unit</b> 3632	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 16 May 2005.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 25-44 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 25-44 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

J. O. D.

### **DETAILED ACTION**

1. This is the sixth office action for serial number 09/990,013. This action is in reply to Applicant's amendment filed 5/16/05. This application contains claims numbered 25-44. Claims 1-24 have been canceled.

### ***Claim Rejections - 35 USC § 102***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 25-44 are rejected under 35 U.S.C. 102(b) as being anticipated by US Patent No. 5,566,624 to Brown et al.

As to claim 25, Brown et al. teaches a base comprising: a frame (20) having one or more side edges, each side edge adapted to extend along a side of an article; one or more sockets (24, 26, 28, 30) having internal sidewall defining open ended wells in the frame that form receptacles capable of receiving feet of the article; a plurality of flexible ribs (41) extending along an internal sidewall of the sockets and projecting inwardly into wells of the socket; the ribs adapted to deform in response to the engagement with a foot of the article upon insertion into the socket, wherein the one or more sockets define open ended wells (42) in the frame for receipt and engagement of the feet of the article. Note that the ribs are inherently flexible since virtually anything will be bent or flexed if enough pressure is applied to it. See the term "flexible" in *Fredman v. Harris-Hub Co., Inc.* 163 USPQ 397 (DC 1969).

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As to claim 25, wherein the frame has four sides, each side can be adapted to extend along one the four sides of the article with relatively outer peripheral edge portions of the base positioned adjacent bottom surfaces of the article.

As to claim 27, wherein an outer peripheral edge portion of each of the sides of the frame is recessed (71) relative to inner portions of the base along the corresponding side, creating a gap between the base and adjacent portions of the article along each side thereof.

As to claim 28, wherein the ribs (41) in the one or more sockets are vertically positioned and project radially inward from sidewalls

Regarding claim 29, wherein the ribs are substantially beveled at their upper edges adjacent an open end of the wells.

Regarding claim 30, wherein the ribs are positioned axially within the wells of the socket.

Regarding claim 31, wherein a bottom edges of the ribs are separated from bottom walls of the sockets (38).

Regarding claim 32, wherein a relatively outer peripheral edge portion of at least one side of the frame is recessed (71) relative to inner portions of the frame along the at least one side, the recess of an outer edge along the at least one side creating a gap between the base and adjacent portions of the article.

Regarding claims 33-44, Brown et al also teaches all the subject matter of these claims which recited limitations similar to those recited in claims 25-32. Note that new

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claims 42-44 further recites the limitations a frame surrounding a central opening. This feature also reads on Brown (see central opening 30)

### ***Response to Arguments***

3. Applicant's arguments filed 5/16/05 have been fully considered but they are not persuasive.

The crux of Applicant's argument are: (1) "the claims must be given their broadest reasonable interpretation ... It is not reasonable to interpret a claim in a way that simply ignores the entire clause "flexible ribs...adapted to deform... The presence of that clause must be construed as requiring a substantially degree of flexibility and deformability, beyond what is inescapable in a "rigid" structure. " (Remarks page 6, last para; and page 7, 1st and 2nd para).

In response to Applicant's argument as highlighted above, the examiner respectfully submits that the claims have been interpreted and given at their broadest reasonable interpretation.

First, with regards to the phrase "adapted to be", it has been held that the recitation that an element is "adapted to" perform a function or intended use is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. In re Hutchison, 69 USPQ 138. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA

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1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963). In this case, device of brown is clearly capable of performing the function or intended use as claimed.

Second, a term “flexibility/flexible” is a relative term, which fails to patentably distinguish over Brown patent. When a term of relative or degree is used, it is necessary to look to specification in which such term arose to determine their meaning. In the present case, the examiner finds no standard in Applicant’s specification to determine to what extent a rib or ribs can be regarded as being “flexible”.

Third, the examiner considers the reinforcing ribs (41) of Brown is flexible since the whole pallet is processed/molded from a thermoplastic material; and Fourth, the ribs of Brown is clearly flexible enough so that it allows stacking or removable from one another.

Applicant has further added claims 42-44 by further limited to a base comprising a frame surrounding a central opening. However, this feature still reads on Brown as pointed out in the rejection.

### ***Conclusion***

**4. THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not

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mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tan Le whose telephone number is (571) 272-6818. The examiner can normally be reached on Mon. through Fri. from 9:00 AM-6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert P. Olszewski can be reached on (571) 272-6788. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Tan Le  
July 27, 2005



ANITA KING  
PRIMARY EXAMINER